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Supreme Court, U.S.
FILED
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No. 90-1629

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

NORDIC VILLAGE, INC., RICHARD A. BAUMGART,
Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief For Respondent

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SUMMARY OF THE ARGUMENT

I. SOVEREIGN IMMUNITY DOES NOT BAR A BANKRUPTCY COURT ORDER TO COMPEL THE UNITED STATES TO RETURN PROPERTY OF THE ESTATE DELIVERED TO THE UNITED STATES AFTER THE COMMENCEMENT OF THE BANKRUPTCY CASE WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR ANY PROVISION OF THE BANKRUPTCY CODE BECAUSE THE PROPERTY IS WITHIN THE EXCLUSIVE IN REM JURISDICTION OF THE BANKRUPTCY COURT.

Claims or assertions of sovereign immunity do not deprive the bankruptcy court of its exclusive *in rem* jurisdiction with respect to property of the estate that was in the custody of the bankruptcy court. Congress has provided that the district court, of which the bankruptcy court is a unit, has exclusive jurisdiction over property of the estate, which jurisdiction begins as of the commencement of the bankruptcy case and lasts as long as the case is still pending.

Under the Bankruptcy Code, as under prior bankruptcy law, sovereign immunity of the United States does not prevent a bankruptcy court from compelling the return of property which was removed from its custody in derogation of bankruptcy law. Sovereign immunity protects property which belongs to the government independent of the bankruptcy process, but where the property has been transferred to the government from the bankruptcy estate the bankruptcy court retains jurisdiction over the property and has the power to order its return where appropriate.

Where, as here, there is no dispute over the fact that the transfer at issue involved property of the bank-

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ruptcy estate, which occurred after the commencement of the case, and was not authorized by the bankruptcy court or the Bankruptcy Code, there can be no question that the property remains within the *in rem* jurisdiction of the bankruptcy court and that the court may compel the United States to return the property to the trustee. Any result to the contrary would violate Congress' grant to the bankruptcy court of exclusive jurisdiction over property of the estate, the Bankruptcy Code provisions governing collection, liquidation and distribution of property of the estate, as well as one of the central policies of bankruptcy law, equality of distribution among creditors.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §106(c) OF THE BANKRUPTCY CODE CONSTITUTES A BROAD WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES IN BANKRUPTCY CASES AND THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE THE BANKRUPTCY COURT TO ISSUE AN ORDER COMPELLING THE UNITED STATES TO RETURN TO THE TRUSTEE PROPERTY OF THE ESTATE TRANSFERRED TO THE UNITED STATES POST-PETITION AND WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR BY ANY PROVISION OF THE BANKRUPTCY CODE.

Section 106(c) is a straight-forward and specific Congressional waiver of federal sovereign immunity. Congress indicated its intent to waive the sovereign immunity of the United States in the statute when it provided, in §106(c)(1) of the Bankruptcy Code, that any provision of the Bankruptcy Code which contains "creditor," "entity" or "governmental unit" applies to

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the United States. The scope of this waiver of sovereign immunity can only be determined by reference to the Bankruptcy Code provisions containing these trigger words. Section 550 contains one of the trigger words and is, therefore, applicable to the United States. The statutory language of §550(a) specifically provides that a bankruptcy court may order the recipient of an avoided transfer to pay the value of the property transferred to the trustee. Section 549 of the Bankruptcy Code grants the trustee the authority to avoid all post-petition transfers of property of the estate that were not authorized by the bankruptcy court or made accordance with any provision of the Bankruptcy Code. Transfers avoided under §549 may be recovered under §550(a) of the Bankruptcy Code. Therefore, §§106 and 550 authorize suits by a trustee to recover from the United States, a transfer of the type involved here, an unauthorized post-petition transfer of property of the bankruptcy estate, notwithstanding any assertion of sovereign immunity.

The legislative history of §106(c) and of §547 provides further evidence of Congressional intent to waive the sovereign immunity of the United States to permit a trustee in bankruptcy to avoid and recover unauthorized transfers of property of the estate.

Finally, the interpretation of §106(c) adopted by the Court of Appeals is consistent with Congressional intent that the United States be treated as any other creditor, with Congressional policy relative to the scope of the bankruptcy estate, and with Congressional concerns relative to equitable distribution of estate assets among creditors.

ARGUMENT

I. SOVEREIGN IMMUNITY DOES NOT BAR A BANKRUPTCY COURT ORDER TO COMPEL THE UNITED STATES TO RETURN PROPERTY OF THE ESTATE DELIVERED TO THE UNITED STATES AFTER THE COMMENCEMENT OF THE BANKRUPTCY CASE WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR ANY PROVISION OF THE BANKRUPTCY CODE BECAUSE THE PROPERTY IS WITHIN THE EXCLUSIVE IN REM JURISDICTION OF THE BANKRUPTCY COURT.

This case presents a narrow issue of law: whether a bankruptcy court can order the Internal Revenue Service, an agency of the United States, to return to the trustee in bankruptcy property of the bankruptcy estate which was transferred or delivered to the United States post-petition; and which transfer or delivery was without authorization by the bankruptcy court and not made under the authority of any provision of the Bankruptcy Code. This case does not involve a claim to funds payable out of the public treasury. The trustee's action seeks the return to the custody of the bankruptcy court of property of the bankruptcy estate, namely the sum of $20,000.00, which was improperly transferred to the United States in derogation of bankruptcy law.

Claims or assertions of sovereign immunity cannot and do not deprive the bankruptcy court of its exclusive *in rem* jurisdiction with respect to property of the estate that was in the custody of the bankruptcy court.

The statutory provision defining jurisdiction over bankruptcy cases and proceedings, 28 U.S.C. §1334, provides, in pertinent part, that "the district courts shall have original and exclusive jurisdiction of all cases

under title 11." 28 U.S.C. §1334(a). The statute further provides that:

> The district court in which a case under title 11 is commenced or is pending *shall have exclusive jurisdiction* of all of the property, wherever located of the debtor as of the commencement of such case, and *of property of the estate*. [Emphasis added].

28 U.S.C. §1334(d).[1] The statutory language makes it crystal clear that a bankruptcy court has exclusive jurisdiction over property of the estate, which jurisdiction begins as of the commencement of the bankruptcy case, and lasts as long as the case is still pending.[2]

---

[1]This provision as originally enacted provided that:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

Subsequently, in 1986, to address a concern that as originally drafted the word "property" did not modify the term "and of the estate", the statute was amended by §144(e) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (Pub. L. No. 99-554), which statute inserted the words "and of property of the estate" in lieu of "and of the estate" at the end of subsection (d). No substantive change seems to have been intended or effected by this amendment.

[2]Petitioner has not challenged this statutory provision granting exclusive jurisdiction over property of the debtor and property of the estate to the district court. However, Petitioner relies extensively on cases interpreting such jurisdictional statutes for the proposition that the sovereign's consent to be sued must be strictly construed. Specifically, Petitioner relies on *United States v. Mitchell*, 445 U.S. 535 (1980); *United States v. Testan*, 424 U.S. 392 (1976); *United States v. King*, 395 U.S. 1 (1969); and *United States v. Sherwood*, 312 U.S. 584 (1941). These cases all dealt with a narrow legal issue, the jurisdiction of the Court of Claims, and all involved interpretation of jurisdictional statutes such as the Tucker Act, the General Allotment Act, and the Declaratory Judgment Act. Such

Under the prior bankruptcy law, the Bankruptcy Act of 1898 (the "Act"), bankruptcy court jurisdiction was defined by notions of possession of property or by consent given by an adverse party under Section 2(a)(7) and former Rule 915.[3] Bankruptcy court juris-

statutes do not create any substantive rights enforceable against the United States, they merely confer jurisdiction upon specified federal courts whenever the substantive right exists. *U.S. v. Mitchell*, 445 U.S. at 538; *U.S. v. Testan*, 424 U.S. at 398. Thus, in interpreting such jurisdictional statutes in light of the special history of the Court of claims, it has been said "that a waiver of sovereign immunity 'cannot be implied, but must be unequivocally expressed.'" *U.S. v. Testan*, 424 U.S. at 399. Claimants must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims. *U.S. v. Mitchell*, 445 U.S. at 538. In examining statutes which create such substantive rights, this Court has repeatedly held that waivers by Congress of federal governmental immunity are to be liberally construed. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984); *Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Yellow Cab Co.*, 543 U.S. 554-55 (1951); *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *FHA v. Burr*, 309 U.S. 242, 245 (1940); *Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939); *Federal Land Bank v. Priddy*, 295 U.S. 229 (1935).

[3]Under §2(a)(7) of the Act the bankruptcy court was granted "such jurisdiction at law and in equity as will enable [it] to exercise original jurisdiction in proceedings . . . to:

> Cause the estates of bankrupts to be collected and reduced to money, and distributed, and determine controversies in relation thereto . . . ; and where in a controversy arising under [the] Act an adverse party does not interpose an objection to the summary jurisdiction of the court of bankruptcy . . . he shall be deemed to have consented to such jurisdiction.

11 U.S.C. §11(a)(7) (repealed). Former Bankruptcy Rule 915 provided that "[A] party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served." 13 COLLIER ON BANKRUPTCY (14th ed. 1978).

diction was essentially *in rem*. Under the Act, the filing of the petition was seen as a *caveat* to all of the world, and had the effect of an attachment and injunction. *Mueller v. Nugent*,184 U.S. 1, 14 (1901); *Bank v. Sherman*, 101 U.S. 403, 406, (1879). The filing of the petition fixed a line of cleavage with reference to the condition of the bankruptcy estate, with title to the property which the bankrupt owned at the time of the filing of the petition vesting in the trustee at the time of the adjudication of bankruptcy.[4] *Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 125-26 (1949); *Everett v. Judson*, 228 U.S. 474, 479 (1913).

Once the petition was filed, the property in the actual or constructive possession of the bankrupt was placed in the custody of the bankruptcy court until distribution among creditors for, as this Court stated:

> It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of Bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among creditors.
>
> The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. . . . [Thus] [p]rovision is made for the prompt taking possession of the bankrupt's prop-

[4]Under the Bankruptcy Code of 1978, there is no longer an adjudication of bankruptcy, but the entry of an Order for Relief which has the same effect. 11 U.S.C. §102(6), §301, §303(h).

> erty before adjudication if necessary. Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the Act.

Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 307-08, 32 S. Ct. 96 (1911)

Under the Act, bankruptcy courts were granted summary jurisdiction to adjudicate controversies relating to the property over which they had actual or constructive possession. The test of this jurisdiction was not in the title to the property, but in the possession of the property by the bankrupt at the time of the filing of the petition in bankruptcy. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 480-81 (1940). Where the property was in the possession of the trustee and wrongfully withdrawn from his custody, the bankruptcy court retained jurisdiction over the property. *Taubel-Scott-Kitzmiller Company, Inc. v. Fox*, 264 U.S. 426, 432-33 (1924). Neither would the jurisdiction of the bankruptcy court be lost by the unauthorized surrender of the property by officers of the Court. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 737, 739 (1931); *Whitney v. Wenman*, 198 U.S. 539, 553 (1904).

Thus, under the bankruptcy law in effect prior to the enactment of the Bankruptcy Code:

> It [was] . . . the established rule that jurisdiction once attaching [was] not lost by the fact that later on possession of the property passe[d] to strangers without order of the Court and while the bankruptcy proceeding [was] still active. It [was] immaterial whether the change in possession ha[d] come about through voluntary transfer by the bankrupt or his agents, seizure by the officers of state courts, or unauthorized surrender by officers of the bankruptcy court; the jurisdiction continue[d] and the court ha[d] summary power to order a return of the property. The filing of the bankruptcy petition ha[d] the effect of an attachment and injunction and the property [was] in *custodia legis*.

Matter of Retail Stores Delivery Corp., 5 F.Supp. 892, 893 (S.D.N.Y. 1933). (See also, *In re P & Z Island Farms, Inc.*, 478 F. Supp. 529 (1979). [Bankruptcy Court deemed to have possession of and title to property as of the date the bankruptcy petition is filed and a wrongful transfer occurring after that date violates the ownership interest of the court]. Indeed, under the Bankruptcy Act, the bankruptcy court's exclusive jurisdiction over property in *custodia legis* was unquestioned. *Cline v. Kaplan*, 323 U.S. 97 (1944); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Harrison v. Chamberlain*, 271 U.S. 191 (1926); *May v. Henderson*, 268 U.S. 111 (1925); *Taubel-Scott-Kitzmiller v. Fox*, 264 U.S. 426 (1924); *White v. Schloerb*, 178 U.S. 542 (1900).

The sovereign immunity of the States or the United States did not prevent a bankruptcy court from compelling the return of property which was part of the bankruptcy estate. "Sovereign immunity protects the property which belongs to the government independent of the bankruptcy process," but where the property has been transferred to the government from the bankruptcy estate, the bankruptcy court retains jurisdiction over the property until the case has been closed and has the power to order its return where appropriate. *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 245 (9th Cir. 1989).

Consequently, the sovereign immunity of the United States did not prevent the bankruptcy court from compelling the United States to repay funds distributed from the bankruptcy estate. *In re Pittsburgh*

Railways, 253 F.2d 654, 657 (3d Cir. 1958), and *In re Greenstreet, Inc.*, 209 F.2d 660, 663 (7th Cir. 1954). Similarly, the bankruptcy court's jurisdiction was not severed upon the payment of a dividend from the bankruptcy estate. If the dividend was for an incorrect amount, the bankruptcy court could order a refund of the overpayment from the United States notwithstanding any assertion of sovereign immunity. *In re Madden*, 388 F. Supp. 47, 50 (D. Idaho 1975). Neither did sovereign immunity bar an action to recover money seized from the debtor's bank accounts after the filing of the bankruptcy petition. *Matter of Reiber's Inn of Westchester, Inc.*, 1 B.R. 304, 306-07 (Bankr. S.D.N.Y.), *aff'd In re Reiber's Inn of Westchester, Inc.*, 3 B.R. 706 (S.D.N.Y. 1980). Thus, under the Bankruptcy Act, if property was removed from the jurisdiction of the bankruptcy court without authorization by the court or the bankruptcy law, the bankruptcy court could compel the United States to return the property to the estate.

In enacting the jurisdictional grant of authority under the Bankruptcy Code of 1978 (the "Code"), which ultimately became 28 U.S.C. §1334, Congress stated that "[t]he idea of possession or consent as the sole basis for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction *as well as in rem jurisdiction* to handle everything that arises in a bankruptcy case."[5] H.R. Rep. No. 595, 95th Cong., lst Sess. 445 (1977). Without any intent or indicia of abandoning

[5]Although this statement was made regarding the enactment of 28 U.S.C. §1471, subsection (e) of which was determined to be unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the language of §1334(d) as enacted was substantially identical to the language of its parallel provision §1471(e) which had granted the district court exclusive jurisdiction over the property of the debtor and property of the estate.

the line of cases dealing with *in rem* jurisdiction, Congress specifically broadened the grant of *in rem* jurisdiction when it enacted 28 U.S.C. §1471, which became §1334 as a result of the Bankruptcy Amendments and Federal Judgeship Act of 1984. It did so in a number of ways. First, by granting exclusive jurisdiction to the district court, of which the bankruptcy court is a unit. Second, it provided that jurisdiction is granted not only to the court in which the case is commenced, but also where ever the case may be pending. Third, it made clear that the grant of exclusive jurisdiction extended not only to property of the debtor, *but also to property of the estate*. 28 U.S.C. §1334(d). Finally, Congress provided that jurisdiction over property of the estate applies equally over all types of cases under title 11, whether liquidation or rehabilitation. KING, 1 COLLIER ON BANKRUPTCY ¶3.01[vii], at 3-32 (15th Ed. 1989).

Congress also intended a broad range of property to be included in the estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204. Section 541 of the Bankruptcy Code provides that:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> • • •
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. §541(a). The statutory language also makes it clear that property of the estate is intended to include in the estate any property made available to the estate pursuant to other provisions of the Bankruptcy Code. 11 U.S.C. §541(a)(3); *Whiting Pools*, 462 U.S. at 205.

Section 542(a) of the Bankruptcy Code further provides that

> [A]n entity, other than a custodian, in possession, custody, or control, *during the case*, of property that the trustee may use . . . shall deliver to the trustee and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. §542(a). [Emphasis added].

It is clear that the *in rem* jurisdiction of the bankruptcy court was enhanced by the enactment of the Bankruptcy Code. Pursuant to 28 U.S.C. §1334(d), the filing of the Debtor's petition vests in the district court of which the bankruptcy court is a unit, jurisdiction over all of the debtor's property. Absent post-petition orders by the bankruptcy court which alter or change that property interest, the court's jurisdiction over property of the estate continues until the case is closed. *In re Maislan Industries, U.S., Inc.*, 69 B.R. 771 (E.D. Mich. 1986). This jurisdictional grant provides a basis for the issuance of orders directing the return to the trustee in bankruptcy of property of the estate, transferred post-petition and without authority of the bankruptcy court or under any provision of the Bankruptcy Code. Thus, in *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025, 1026 (5th Cir. 1985), it was held that the filing of a petition under Chapter 11 of the Bankruptcy Code automatically stayed the proposed sale of the debtor's vessel to enforce a maritime lien and deprived the admiralty court of jurisdiction over the vessel.

Therefore, the post-petition sale of the vessel was determined to be null and void and the vessel was ordered returned to the debtor. (See also, *In re Modern Boats, Inc.*, 775 F.2d 619 (5th Cir. 1985).

Additionally, Congress, in §502(j), specifically codified the right to recover overpayments by or from the estate, the express language being "This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor." 11 U.S.C. §502(j). Similarly, the absolute prohibition on post-petition removal of property of the estate from the *in rem* jurisdiction of the Bankruptcy Court was codified in §549, which in substance provides, that the trustee may avoid a transfer of property of the estate - made after the commencement of the case; that is not authorized by the Bankruptcy Code or an order of the Bankruptcy Court.

Here, the trustee commenced his action to obtain the recovery of property of the estate, the sum of $20,000.00, transferred to the United States after the commencement of the Debtor's bankruptcy case without authorization by the bankruptcy court or any provision of the Bankruptcy Code. The bankruptcy court found that there was "no dispute that the transfers took place subsequent to the filing of the Chapter 11 petition and were not authorized by the Code or this Court." (Petition - Appendix E - p. 48a). The District Court, in its Post-Judgment Order denying the United States' Motion to Alter or Amend Judgment, found that the United States had notice of the pendency of the bankruptcy proceedings and was on constructive notice as to the source of the funds since the cashiers check for $20,000.00 which the United States received referenced the debtor as the remitter. (Petition - Appendix B - p. 40a). The Sixth Circuit Court of Appeals also found that:

> Because of the words "REMITTER: SWISS HAUS, INC.," it cannot be said that the IRS acted without knowledge of the voidability of the transfer . . . This notation is sufficient to place a reasonable person on notice that the transfer was illegitimate, and by extension, that it was voidable.

(Petition - Appendix A - p. 16a). Petitioner has not appealed either of these determinations and it is, therefore, undisputed that the transfer at issue was an unauthorized post-petition transfer of property of the estate, made without authorization of the bankruptcy court or any provision of the Bankruptcy Code and that the United States had notice that the funds were from the Debtor's bank account.

Clearly, under these facts, the United States cannot bar recovery of this property of the Debtor's bankruptcy estate by hiding behind the shield of sovereign immunity. The Debtor's bankruptcy case is still pending. The property is within the *in rem* jurisdiction of the bankruptcy court since 28 U.S.C. §1334(d) grants the district court exclusive jurisdiction over the property of the estate. Because the status of the funds as property of the estate has not been altered by a bankruptcy court order, the property has retained its character as property of the estate and the court's jurisdiction thereover continues. Finally, because the funds are property of the estate the Court has an obligation to make sure that the funds are distributed equally among creditors in accordance with §726 of the Bankruptcy Code.

Thus, the Sixth Circuit Court of Appeals correctly affirmed the decision of the courts below requiring the United States to return the the property of the estate which it received after the commencement of the Debtor's bankruptcy case and without authorization by either the bankruptcy court or the Bankruptcy Code. To

hold otherwise would violate the grant of jurisdiction found in 28 U.S.C. §1334(d), the provisions of the bankruptcy code governing collection, liquidation and distribution of property of the estate, as well as one of the central policies of bankruptcy law, equality of distribution among creditors.[6]

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[6]Petitioner acknowledges that the Trustee's claim against the United States is based upon a defalcation by an officer of Nordic Village after the Chapter 11 petition was filed. (Brief for United States - p. 12, n. 14). Essentially the United States argues that a fiduciary may embezzle trust money to pay the fiduciary's personal tax obligations and that the stolen money cannot be recovered from the United States because of governmental immunity. This is clearly contrary to the law of trusts. The general rule being, where property held in or upon any trust is misapplied or converted it remains subject to the rights of the original owner or beneficiary of the trust. *Cook v. Tullis*, 85 U.S. 332 (1873); *Oliver v. Piatt*, 44 U.S. 333 (1845); *Cf., In Re: Bell & Backwith*, 838 F.2d 844 (6th Cir. 1988); *RESTATEMENT OF RESTITUTION* §168 (1937). These precepts are applicable to the United States as this Court has recognized:

> The United States we have held cannot, as against the claim of an innocent party, hold his money which has done into its treasury by means of the fraud of their agent. *United States v. State Bank*, 96 U.S. 30 [(1877)]. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts to a fraud on the taxpayer.

Bull v. United States, 295 U.S. 247, 261 (1935); *United States v. State Bank*, 96 U.S. 30 (1877). The United States is required to be honest with its citizens just as much as its citizens are required to exercise common honesty with their government. For, as Justice Frankfurter wrote, "the doctrine [of sovereign immunity] is not absolute, . . . considerations of fair play must be taken into account in its application." *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 364 (1955). Thus, where here, the United States received trust money, with notice of the bankruptcy and notice of the source of the funds and applied them to a third persons obligations, sovereign immunity should not be a bar to recovery of the funds.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT §106(c) OF THE BANKRUPTCY CODE CONSTITUTES A BROAD WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES IN BANKRUPTCY CASES AND THAT §§549 AND 550 OF THE BANKRUPTCY CODE AUTHORIZE THE BANKRUPTCY COURT TO ISSUE AN ORDER COMPELLING THE UNITED STATES TO RETURN TO THE TRUSTEE PROPERTY OF THE ESTATE TRANSFERRED TO THE UNITED STATES POST-PETITION AND WITHOUT AUTHORIZATION OF THE BANKRUPTCY COURT OR BY ANY PROVISION OF THE BANKRUPTCY CODE.

It is beyond question that Congress has waived the sovereign immunity of the United States under any provision of the Bankruptcy Code which contains the words "creditor", "entity", or "governmental units". Section 106 is clearly designated a "Waiver of Sovereign Immunity". 11 U.S.C. §106. By its express language, §106(c) provides that "*notwithstanding any assertion of sovereign immunity* . . . a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units." 11 U.S.C. §106(c). The term "governmental unit" is specifically defined to include the United States and any department, agency or instrumentality of the United States. 11 U.S.C. §101(26). Thus, this Court must merely determine whether or not an order to return property of the estate, transferred to the United States after the commencement of the bankruptcy case without authorization by either the bankruptcy court or the Bankruptcy Code, is within the scope of this waiver.

Petitioner, in essence, argues that this waiver of sovereign immunity is limited to declaratory or injunctive relief and does not encompass monetary recovery as the language of §106(c)(2) provides that "a determination by the court of an issue arising under such a provision [one containing one of the trigger words] binds governmental units." Petitioner specifically relies on this Court's recent decision in *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989), a case involving the Eleventh Amendment immunity of the States. In *Hoffman*, 492 U.S. at 104, a plurality of a sharply divided Court concluded that the language of §106(c) did not abrogate the Eleventh Amendment immunity of the States to actions for monetary relief where the State did not waive its immunity by filing a proof of claim.

An examination of the opinions entered in *Hoffman* indicates that the case contains no controlling analysis of §106(c) of the Bankruptcy Code. Four justices, in an opinion written by Justice White, concluded that §106(c) did not abrogate the sovereign immunity of the states as Congressional intent to do so was not unmistakably clear in the language of the statute. *Hoffman*, 492 U.S. at 104. Four Justices, in an opinion written by Justice Marshall, held that the language of §106(c) satisfied even the requirement that Congress' intent to abrogate the Eleventh Amendment immunity of the States be "unmistakably clear" and that §106(c) did authorize a bankruptcy court to issue a money judgment against a State that had not filed a proof of claim in a bankruptcy proceeding. *Hoffman*, 492 U.S. at 106 (Marshall, J., joined by Brennan, Blackmun, & Stevens, J.J., dissenting). The deciding vote was delivered by Justice Scalia, who did not construe the statute, concluding instead that Congress did not have the power to abrogate the States' Eleventh Amendment immunity and

therefore Congressional intent to do so was irrelevant. *Hoffman*, 492 U.S. at 105. The opinion of an equally divided court is entitled to no precedential value. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *TWA, Inc. v. Hardison*, 432 U.S. 63, 73 n.8 (1977); *Neil v. Biggers*, 409 U.S. 188, 192 (1972); see also, *In re Pearson*, 917 F.2d 1215, 1216 (9th Cir. 1990), petition for cert. pending No. 90-1208, ("While other courts have found this rationale sufficient, we know that four is less than five.").

The *Hoffman* decision focused on a narrow legal issue, an issue which is not present in this case: "whether §106(c) of the Bankruptcy Code, 11 U.S.C. §106(c), authorizes a bankruptcy court to issue a money judgment against a *State* that has not filed a proof of claim in the bankruptcy proceeding." [Emphasis added]. *Hoffman*, 492 U.S. at 98. The standard applied by the plurality was whether Congress had made its intent to abrogate the *States'* Eleventh Amendment immunity "unmistakably clear in the language of the statute." *Hoffman*, 492 U.S. at 101 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). The plurality held that "in enacting §106(c) Congress did not abrogate the Eleventh Amendment immunity of the *States*" further emphasizing the narrowness of the issue it was deciding. [Emphasis added]. *Hoffman*, 492 U.S. at 104.

The present case deals with the sovereign immunity of the United States. Congressional power to abrogate the States' Eleventh Amendment immunity is not at issue. There is no question as to the power of Congress to waive federal governmental immunity, just as there is no doubt that Congress has full power to determine the extent to which the United States may be subjected to suit. *FHA v. Burr*, 309 U.S. at 244. Thus, the Court of Appeals correctly concluded that:

> This is a simple case involving the construction of language enacted by Congress, not a constitutional amendment relating to a fundamental concept of federalism. We do not have before us in this case issues relating to states' rights and central power and the various doctrines that have been developed to prevent overreaching by the federal government.

(Petition, Appendix A - p. 12a).[7]

Further, while it is true that under the common law doctrine of sovereign immunity the United States, like the States, has an interest in being free from suit, there is a distinction between common law sovereign immunity and the constitutional protections of the Eleventh Amendment. Common law sovereign immunity protects the government from a suit brought by one of its own

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[7]Numerous other courts have also concluded that *Hoffman* is not applicable in a case involving the United States. In *In re Simmons*, 110 B.R. 72, 73 (Bankr. M.D. Fla. 1990) the bankruptcy court held that "The [Internal Revenue Service's] reliance upon *Hoffman* is inapposite. The holding in *Hoffman*, like the [Eleventh] [A]mendment, does not apply to the federal government. *Hoffman* simply holds that a state is immune from damage claims of the Trustee under the [Eleventh] [A]mendment." Similarly, in *In re Iverson*, 108 B.R. 272, 273 (Bankr. D. Or. 1989) the bankruptcy court concluded that "The government misreads *Hoffman*. The Court did not under any reasonable construction reduce jurisdiction in cases against the United States such as *United States v. Whiting Pools, Inc.*, . . . where there is clear Congressional consent to liability and a substantive waiver of sovereign immunity." In *In re Price*, 103 B.R. 989, 994 (Bankr. N.D. Ill. 1989) aff'd. *In re Price* — B.R. — (N.D. Ill. 1991) (No. 89 C 7852, 89 B 00796), the bankruptcy court, in a decision recently affirmed by the district court, held that "The IRS's reliance on *Hoffman* is inapposite. The holding in *Hoffman* does not apply to the federal government. . . . The Supreme Court, interpreting the section 106 waiver of sovereign immunity narrowly, held that §106(c) should not be read to abrogate the [Eleventh] [A]mendment immunity of the state where the state has not voluntarily consented to a waiver."

citizens. A waiver of common law sovereign immunity goes to "whether" or "when" the government may be sued. The Eleventh Amendment, on the other hand, is a specific Constitutional provision which prohibits suits against the States in federal court. *In re Lawson Burich Association, Inc.*, 59 B.R. 681, 687 n. 8 (Bankr. S.D. N.Y. 1986), citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99-100 (1984); *In re 995 Fifth Ave. Associates, L.P.*,116 B.R. 384, 390 n. 5 (Bankr. S.D.N.Y. 1990). The Eleventh Amendment thus speaks to the forum in which a state may be sued and this Court has required plaintiffs to meet a stringent standard in demonstrating Congressional intent to abrogate this Eleventh Amendment immunity so that a state may be sued in federal court. (See *Atascadero*, 473 U.S. at 243; *Pennhurst State School*, 465 U.S. at 99-100). There is no analogous choice of forum problem where the United States or its agencies are sued in federal court. Therefore, Petitioner's assertion that the Court of Appeals should have utilized the stringent standard applied by the plurality in *Hoffman* in this case involving a Congressional waiver of federal sovereign immunity is incorrect as a matter of law.

A. Congressional Waivers Of Federal Sovereign Immunity Are To Be Liberally Construed.

This case involves the waiver of federal sovereign immunity by Congress. This Court's analysis must start with the premise that such waivers by Congress of governmental immunity are to be liberally construed. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. at 517; *Block v. Neal*, 460 U.S. at 298; *United States v. Yellow Cab Co.*, 543 U.S. at 554-55; *United States v. Aetna Surety Co.*, 338 U.S. at 383; *FHA v. Burr*, 309 U.S. at 245. This approach "is in line with the current disfavor of the doctrine of the governmental

immunity from suit as evidenced by the increasing tendency of Congress to waive the immunity. . . ." *Franchise Tax Board of California*, 467 U.S. at 517 (Quoting *FHA v. Burr*, 309 U.S. at 244). For as this Court observed in *United States v. Shaw*, 309 U.S. 495, 501 (1940), "A sense of justice has brought a progressive relaxation by legislative enactment of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities permit, prerogatives of government yield to the needs of the citizen...when authority is given, it is liberally construed." Thus, if a waiver of federal sovereign immunity is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the waiver is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress that the waiver of sovereign immunity be construed in a narrow sense. *FHA v. Burr*, 309 U.S. at 245.

The extent to which the United States is amenable to process is clearly a question of Congressional intent. Both the language of the statute and its legislative history should be examined by this Court in determining Congressional intent. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Legislative history is relevant to a determination of the scope of a Congressional waiver of federal sovereign immunity. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. at 520, n. 13. Further, Congressional intent to waive sovereign immunity and the scope of such a waiver can only be ascertained by reference to the underlying Congressional policy. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. at 389.

B. The Plain Language Of Section 106(c) Expressly Waives Federal Sovereign Immunity Under Each Bankruptcy Code Provision Containing Any Of The Three Trigger Words Specified In Section 106(c)(1).

It is well settled that the starting point for interpreting a statute is the language of the statute itself. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). However, as was recently noted by this Court in a case construing other provisions of the Bankruptcy Code:

> The text is only the starting point. . . . "in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Kelly v. Robinson, 479 U.S. 36, 43 (1986) (citations omitted).

Section 106 of the Bankruptcy Code provides:

> (a) A Governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsection (a) and (b) of this section and notwithstanding any assertion of sovereign immunity —

> (1) A provision of this title that contains "creditor", "entity", or "governmental unit", applies to governmental units; and
>
> (2) A determination by the Court of an issue arising under such a provision binds governmental units.

11 U.S.C. §106. It is clear on the face of §106(c), by the use of the language "notwithstanding any assertion of sovereign immunity" that Congress intended to waive any claim of sovereign immunity for the United States under any section of the code containing one of the trigger words.[8]

Congress carefully considered the impact that the proposed Bankruptcy Code would have on the United States. *Whiting Pools*, 462 U.S. at 209. Thus, the choice of the §106(c)(1) trigger words is significant. By choosing "creditor," Congress indicated that the United States was to stand in the same position as any other creditor with respect to pre-petition claims against the estate. See H.R. Rep. No. 595, 95th Cong., lst Sess. 309; S. Rep. No. 989, 95th Cong., 2nd Sess. 21. By applying to the United States those Bankruptcy Code sections incorporating the broad term "entity," and by defining "entity" to include a governmental unit, Congress chose to treat the United States the same as everyone else even where

[8]Besides the Sixth Circuit in this case, numerous Courts have concluded that Congress intended to waive any assertion of sovereign immunity by the Federal Government under any section containing the trigger words listed in §106(c)(1). See, *Neavear v. Schweiker*, 674 F2d 1201, 1202-1204 (7th Cir. 1982); *Gingold v. United States*, 80 B.R. 555, 561 (Bankr. N.D. Ga. 1987); *R & L Refunds v. United States*, 45 B.R. 733, 735 (Bankr. W.D. Ky. 1985); *Gower v. Farmers Home Administration*, 20 B.R. 519, 521-522 (Bankr. N.D. Ga. 1982); *Remke, Inc. v. United States*, 5 B.R. 299, 300-302 (Bankr. E.D. Mich. 1980).

the United States has no pre-petition claim against the debtor. *Whiting Pools*, 462 U.S. at 209.

This Court, in *Whiting Pools*, has previously determined that the United States is subject to a bankruptcy court order to return property of the bankruptcy estate seized pre-petition and pursuant to a valid tax levy. This Court's examination of the Bankruptcy Code in *Whiting Pools* revealed that Congress decided to provide protection to the United States through grants of enhanced priorities for unsecured tax claims, §507(a)(7), by the non-discharge of tax liabilities, §523(a)(1), and by permitting the United States to enjoy the generally applicable right to adequate protection, under §363(e) of the Bankruptcy Code, for property subject to its tax liens. *Whiting Pools*, 462 U.S. at 209. This Court specifically found that the United States was to be treated as any other creditor as nothing in the Bankruptcy Code or its legislative history indicated that Congress intended a special exemption for the United States. *Whiting Pools*, 462 U.S. at 209. All of which is to emphasize the fact that if Congress had intended that the United States be preferred or that it be granted a supercreditor status it could have easily done so by limiting the §106(c) waiver to just those sections containing the term "governmental units". Clearly, Congress intended that the United States be treated just like any other creditor in a bankruptcy case.

Further, the scope of the waiver of sovereign immunity found in §106(c) can only be determined by reference to the Code provisions containing the trigger words "creditor," "entity," and "governmental unit." *Hoffman*, 492 U.S. at 109 (Marshall J., joined by Brennan, Blackmun and Stevens, J.J. dissenting). First, because applicability of any provision to the United States is dependent upon the presence of one of the trigger

words in the statutory language. Second, because the terms of the triggered provisions shape the involvement of the United States in any particular bankruptcy proceeding.[9] Thus, the United States obtains the benefits of those provisions that provide rights to the sovereign and no remedies to the debtor.[10] The United States also obtains the protection of those provisions that provide remedies to the Debtor, but by their express language

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[9]This is not only implicit in the statutory language, it is made explicit by the legislative history wherein Congress indicated the scope of the waiver contained in §106(c) by referring to other provisions of the Bankruptcy Code as examples of provisions made applicable to the United States by §106(c). "For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit." (124 Cong. Rec. 32394 (1978); 124 Cong. Rec. 33993 (1978).

[10]See, e.g., §303(b)(1) (permitting three or more "entities" to file an involuntary case against the debtor); §303(c) (giving "creditors" who do not file an involuntary case the same rights as those who do); §303(j) (requiring notice to all "creditors") before a Court may dismiss an involuntary case); §341(a) (requiring a meeting of "creditors"); §343 (permitting "creditors" to examine the Debtor); §349(b)(3) (revesting property in an "entity" if the petition is dismissed); §361 (setting forth adequate protection for certain property interest of an "entity"); §363(c)(2)(A) (preventing use, lease, or sale of cash collateral assets absent consent of an interested "entity"); §§501 and 502 (regulating filing of proofs of claims by "creditors"); §506(a) (granting secure status to lien "creditors"); §553 (granting rights of setoff to certain "creditors"); §§702(a) and 705 (giving qualified "creditors" the right to vote for the Trustee and the Creditors' Committee); §§507 and 726 (setting forth priorities of distribution to "creditors"); §727(c) (giving a "creditor" the right to object to a discharge); §1102 (providing for Court appointed creditors' committee); §1109(b) (giving a "creditor" the right to be heard on any issue); §1121(c) (providing that a "creditor" may file a reorganization plan). *Hoffman*, 492 U.S. at 108 n. 2 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

are limited to declaratory or injunctive relief.[11] Finally, under a mere handful of the triggered provisions the United States is exposed to money judgments, just like any other creditor or entity. *Hoffman*, 492 U.S. at 108-09 (Marshall J., joined by Brennan, Blackmun, and Stevens, J.J. dissenting).[12]

The existence of a category of provisions limited to declaratory or injunctive relief and the existence of a category of provisions providing for monetary recovery indicates that Congress consciously chose to permit actions for monetary recovery against the United States. The limited number of provisions providing for monetary recovery created under or by the Bankruptcy Code, as distinguished from those existing outside of bankruptcy law, reflect Congressional intent not to limit this remedy with respect to the rights of recovery created by or under bankruptcy law. Additionally, each section

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[11]See, e.g., §365 (permitting the Trustee to assume or reject executory contracts and unexpired leases in certain circumstances); §505 (permitting the Bankruptcy Court to determine the Debtor's tax liability in certain circumstances); §525 (protecting the Debtor against government discrimination in licensing and employment); §1141 (binding "creditors" to the terms of a confirmed reorganization plan and discharging all other claims); §1142 (permitting the Bankruptcy Court to require performance of any act necessary to carry out a confirmed reorganization plan); §1143 (preventing an "entity" that fails to perform a required act from participating in the distribution of estate assets). *Hoffman*, 492 U.S. at 108 n. 3 (Marshall, J., joined by Brennan, Blackmun and Stevens, J.J. dissenting).

[12]Petitioner has specifically identified only four provisions where, under the interpretation of §106(c) adopted by the Court of Appeals, the United States would be exposed to actions for monetary recovery: §549 involving post-petition transfers, §547 involving preferential transfers, and claims for the turnover of funds under §542(a) and §542(b) of the Bankruptcy Code. (Petition, p. 13 n. 15; Brief, p. 14).

permitting monetary recovery is an exercise of a power unique to the bankruptcy laws, reflecting the fact that Congress has the exclusive, unrestricted and paramount right to devise the bankruptcy laws in the United States.

This case involves an unauthorized post-petition transfer of property of the bankruptcy estate by an officer of the Debtor, then acting as Debtor in Possession pursuant to §§1107 and 1108 of the Bankruptcy Code, to an agency of the United States, the Internal Revenue Service, in payment of the personal tax obligation of the defalcating officer. It is undisputed that the transfer to the United States sought to be avoided by the Trustee occurred post-petition and involved property of the estate. Petitioner has never alleged, and the record is devoid of any indicia or suggestion, that the complained of post-petition transfer was authorized by the Bankruptcy Court or under any provision of the Bankruptcy Code. The Court of Appeals found that under these facts the transfer at issue was voidable under §549 and could be recovered by the Trustee under §550 of the Bankruptcy Code. (Petition - Appendix A, p. 13a-14a). Section 550 of the Bankruptcy Code is a provision containing one of the trigger words found in §106(c). Thus, the scope of the waiver of federal sovereign immunity in this case must be determined by reference to §550 of the Bankruptcy Code.

C. Sections 106(c) And 550(a) Of The Bankruptcy Code Authorize Suits By A Trustee In Bankruptcy To Recover Unauthorized Post-Petition Transfers Of Property Of The Estate From The United States.

Section 550 of the Bankruptcy Code is the provision which creates a mechanism whereby avoided transfers are brought back into the bankruptcy estate. Section 550(a) provides that:

(a) Except as otherwise provided, in this section, to the extent that a transfer is avoided under §§544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the Trustee may recover, for the benefit of the estate, the property transferred, or, if the Court so orders, *the value of such property*, from —

(1) The initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) Any immediate or mediate transferee of such initial transferee. [Emphasis added].

11 U.S.C. §550(a). By express statutory language, this section authorizes the recovery of the property transferred, *or, if the Court so orders, the value of such property, . . .*". [Emphasis added]. 11 U.S.C. §550(a). By authorizing the "recovery" of the "value" of the property transferred, the statute clearly indicates Congressional intent to waive the sovereign immunity of the United States to actions in bankruptcy court seeking monetary recovery under §550 of the Bankruptcy Code and the specific Code provisions cited therein.[13] Further, the stated purpose for the recovery of any transfers avoided under the specified provisions is to benefit the bankruptcy estate. 11 U.S.C. §550(a).

Transfers avoided under §549 of the Bankruptcy Code may be recovered under §550(a). 11 U.S.C. §550(a). Section 549(a) provides, in pertinent part, that:

[T]he trustee may avoid a transfer of property of the estate —

[13]Similarly, §542(a) provides, in pertinent part, "that an 'entity'... shall deliver to the Trustee... such property or *the value of such property. . .* " 11 U.S.C. §542(a).

(1) made after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

11 U.S.C. §549. The language of §549 is precise and explicit. It grants a trustee in bankruptcy the authority to avoid *all* post-petition transfers of property of the estate that are either unauthorized by the bankruptcy court or by the Bankruptcy Code, including those that are authorized by §§303(f) or §542(c) of the Bankruptcy Code.[14] Once it is determined that a transfer is avoidable under §549, the property transferred or, if the bankruptcy court so orders, "the value of such property" may be recovered by the trustee pursuant to §550(a). 11 U.S.C. §550(a). Clearly, under the facts of this case, and based upon the express language of the §550(a), the scope of the waiver of sovereign immunity contained in §106(c)(1) permits monetary recovery from the United States.

[14]The trustee's avoiding powers under §549 are limited in three ways. Subsections (b) and (c) create two very narrow exceptions to the trustee's power of avoidance. First, §549(b) provides that transfers during the "involuntary gap" period between the filing of the petition and the order for relief in an involuntary case are not voidable to the extent that post-petition value is given. Section 549(c) provides that a trustee may not avoid transfers of realty to good faith purchasers for present fair equivalent value and without knowledge of the commencement of the case, if a copy or notice of the petition has not been filed in an appropriate recording office where the property is located. Section 549(d) contains a separate statute of limitations for the trustee's avoiding powers under §549. None of these limitations are applicable to this case. 4 COLLIER ON BANKRUPTCY ¶549-02 (15th Ed. 1989).

Petitioner argues that the language of §106(c)(2) is a limitation on the waiver of federal sovereign immunity contained in §106(c)(1) and, contrary to statutory language permitting the recovery of the "value of the property transferred", that the bankruptcy court in this case could only enter injunctive or declaratory relief. Petitioner specifically focuses on the words "determination" and "issue". (Brief - p. 10-11). Petitioner's argument ignores one of the fundamental rules of statutory construction, that an otherwise undefined term in a statute must be given its common meaning, absent a clearly expressed legislative intent to the contrary. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Burns v. Alcala*, 420 U.S. 575 (1975). BLACK'S LAW DICTIONARY defines "determination" as "the decision of a court or administrative agency. It implies an ending or finality of a controversy or suit. *Piccone v. U.S.*, 186 Ct.Cl. 752, 407 F.2d 866, 873 [(Ct. Cl. 1969)]" BLACK'S LAW DICTIONARY 405 (5th ed. 1979). The word "issue" is defined as:

> a disputed point or question to which parties to action have narrowed their several allegations and upon which they are desirous of either decision of Court on question or law or of court or jury on question of fact.

BLACK'S LAW DICTIONARY 745 (5th ed. 1979). Petitioner presents no evidence of clear Congressional intent that the words "determination" and "issue" be given anything but their common meanings.

Further, Petitioner's detailed structural analysis of §106 and attempts to assign restrictive interpretations to the statutory language, ignores the fact that its analysis is entirely unsupported by the legislative history. When §106(c) first appeared in the proposed legislation it was specifically stated that:

> The provision indicates that the use of the term "creditor," "entity," and "governmental unit" in Title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective.

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Thus, §106(c)(2), makes explicit the waiver of sovereign immunity by providing that the United States will be bound by those orders of the bankruptcy court embodying the court's decision on any question of law or question of fact arising under any of the provisions containing the trigger words. *Hoffman*, 492 U.S. at 106 (Marshall, J., joined by Brennan, Blackmun, & Stevens, J.J., dissenting).

Indeed, if one were to combine the relevant language of §§106(c) and 550(a), the waiver of sovereign immunity would, under the facts of this case read as follows:

> notwithstanding any assertion of sovereign immunity [to the extent that a transfer is avoided under §549 of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, *the value of such property*, from] the United States; and a determination by the Court of an issue arising under [§550(a)], binds the United States.

Read in this fashion, the language clearly reflects that the United States is bound by any decision of the bankruptcy court on any question or point of law arising

under §550(a) of the Bankruptcy Code. Consequently, the bankruptcy court below could order the United States to return to the trustee property of the bankruptcy estate which it received after the commencement of the bankruptcy case and without authorization by the court or the Bankruptcy Code, and the United States was bound by that Order.

D. The Legislative History of §106 Indicates That Congress Intended To Waive The Sovereign Immunity Of The United States To Actions For Monetary Recovery Under A Handful Of Provisions Of The Bankruptcy Code Containing The Trigger Words Specified In §106(c).

In any inquiry to determine Congressional intent, legislative history should be thoroughly considered. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Flora v. United States*, 357 U.S. 63, 65 (1958), aff'd after reh'g, 362 U.S. 145, reh'g denied, 362 U.S. 972 (1960). Legislative history is relevant to a determination of the scope of a Congressional waiver of federal sovereign immunity. *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. at 520, n.13. Review of the legislative history of §106(c) is, therefore, proper in this case.

The waiver of sovereign immunity contained in §106 of the Bankruptcy Code evolved in three steps. The waiver originated in a proposal submitted by the Commission on the Bankruptcy Laws of the United States, the language of which provided:

> All provisions of this Act shall apply to the United States and to every department, agency and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided. This section does not render any branch or unit of the government eligible for relief as a petitioner except as provided in Chapter VIII, or subject to relief as a debtor upon an involuntary petition.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137 93rd Cong., lst Sess. Pt. 2 at 10 (1973).[15]

Subsequently, the House and Senate enacted identical narrow waivers of sovereign immunity, providing as follows:

> *Section 106 Waiver of Sovereign Immunity.*
>
> (a) A governmental unit that files a proof of claim under section 501 of this title is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit for which such governmental unit filed a proof of claim or interest under section 501 of this title any claim against such governmental unit that is property of the estate.

H.R. 8200, 95th Cong., lst Sess. 324 (1977); S. 2266, 95th Cong., 2nd Sess. 313 (1978). The Committee reports which accompany this provision were also identical and indicative of the narrowness of the proposed waiver of sovereign immunity, stating:

> Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Con-

[15]The Commission's proposal was included in Bills introduced in the 94th Congress. S. 236, 94th Cong. lst Sess. (1975); H.R. 31, 94th Cong. lst Sess. (1975).

gress has the power to waive sovereign immunity for the federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy. Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of bankrupt [sic] estate against a State, though it may exercise its bankruptcy powers through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy.

• • •

Though this subsection creates a partial waiver of immunity when the governmental unit files a proof of claim, it does not waive immunity if the debtor or trustee, and not the governmental unit, files proof of a governmental unit's claim under proposed 11 U.S.C. §501(c).

> This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against the sovereign.

H.R. Rep. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. 989, 95th Cong., 2nd Sess. 29-30 (1978).

Thus, as originally proposed, sovereign immunity would not have been waived unless the United States had submitted to the jurisdiction of the bankruptcy court by filing a proof of claim. Further, although any claim which was property of the estate could be asserted, including specifically those claims which arose independent of the bankruptcy process, relief was limited to compulsory counterclaims and offsets.

These proposals were referred to a Conference Committee where sections 106(a) and (b) were reworded and where §106(c) made its initial and permanent appearance. Although the conference committee did not issue a report, the floor managers of the legislation read into the Congressional Record identical statements explaining the conference committee's work. In this statement, the intent of §106(c) was set forth:

> Section 106(c) relating to sovereign immunity is new. *The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirements in case law that an express waiver of sovereign immunity is required in order to be effective.* [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini).

The scope of the waiver of sovereign immunity contained in §106(c) was then indicated in the legislative history by use of examples demonstrating its effect on the United States:

> Section 106(c) codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975) and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and the dischargeability of tax liabilities owing by the debtor or the estate prior to or during the bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in §§106(a) and 106(b), *subsection (c) is not limited to these issues, but permits a bankruptcy court to bind*

governmental units on other matters as well. For example, §106(c) permits a trustee or a debtor-in-possession to assert avoiding powers under Title 11 against a governmental unit; contrary language in the house report to H.R. 8200 is thereby overruled. [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini).

Subsequent statements by the floor managers added:

> Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

124 Cong. Rec. 32400 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 34000 (1978) (statement of Sen. DeConcini).

An examination of the legislative history of §547 is appropriate in view of the specific reference to that provision contained in the legislative statements surrounding §106(c). Section 547 of the Bankruptcy Code deals with preferential transfers and is one of the provisions which brings into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. *Whiting Pools*, 462 U.S. at 205, n. 10.

The present version of §547 represents a compromise between the two different versions enacted by the House and the Senate. The House version of §547(b)(2) provided a general rule making voidable *any* transfer "for or on account of an antecedent debt owed by the debtor before such transfer was made." Section 547(c) created an exception for debts both incurred and, within 45 days thereafter, paid in the ordinary course of business. Thus, the House bill afforded no special treatment to either withheld taxes or to pre-petition tax payments. Moreover, the House Report's commentary indicated that the trustee would be able to recover pre-petition tax payments unless they fell within the protection of §547(c). This report specifically provided:

> Subsection (b) is the operative provision of the section. It authorizes the trustee to avoid a transfer if five conditions are met. These are the five elements of a preference action . . . Second, the transfer must be for or on account of an antecedent debt owed by the debtor before the transfer was made.
>
> ° ° °
>
> This provision will not apply to permit the trustee to *recover* estimated tax payments by a debtor, because no tax is due when the payments are made.
>
> Therefore, the tax on account of which the payment is made is not an antecedent debt. A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code §7501(a) and thus will not be a preference because the beneficiary of the trust, the taxing authority, is in a separate class with respect to those taxes, if they have been properly held for payment as they will have been if the debtor is able to make the payments.

Subsection (c) contains exceptions to the trustee's avoiding power. . . .

The second exception protects ordinary course of business . . . transfers. . . .

In the tax context, this exception will mean that a payment of taxes when they are due, either originally or under an extension, or within 45 days thereafter, will not constitute a voidable preference. However, if a payment is made later than the last day on which the tax may be paid without penalty, than the payment may constitute a preference, if the other elements of a preference are present. In that case, the tax would be an antecedent debt and would not fall under this exception. *However, the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. §106.*

H.R. Rep. No. 595, 95th Cong., lst Sess. 373 (1977). [Emphasis added]. The proposed §106 to which the House Report refers contained only what is now §106(a) and (b).

The House bill was then sent to the Senate which had been drafting its own legislation. Instead of simply amending H.R. 8200 to conform to that legislation, the Senate passed its own bill, S. 2266, and substituted it for the House version. The Senate bill specifically protected taxing authorities. Section 541(b)(3) of the Senate bill would have excluded from the debtor's estate any "taxes withheld or collected from others pursuant to Federal, State, or local law before the commencement of the case and required to be paid to a governmental unit." Furthermore, in §547(b)(2) of the Senate bill, the Senate totally exempted from the preference rules any prepetition tax payments by the debtor:

> the trustee may avoid any transfer of property of the debtor . . . for or on account of an antecedent debt other than a debt for which the payment is required under the revenue laws of a governmental unit, owed by the debtor before such transfer was made.

S. 2266, 95th Cong., 2nd Sess. 433 (1978).

The Senate report reflected the difference in the proposed legislation. The paragraph in the House Report relating to estimated tax payments and withheld taxes was deleted, and in its place was inserted the comment that "[s]ubsection (b)(2) of this section in effect exempts from the preference rules payments by the debtor of tax liabilities, regardless of their priority status." Those portions of the House Report which discussed the application of the ordinary course of business exception found in subsection (c) was also deleted with no substitution made. S. Rep. No. 989, 96th Cong., 2d Sess. 88 (1978).

Senate and House members then agreed on compromise amendments to the Senate bill, adopting the House version of §547 and rejecting the alternative language contained in the Senate bill. In addition, §547(a)(4) was added, which subsection provided that "a debt for tax is incurred on the day when such tax is last payable, including any extension, without penalty." 11 U.S.C. §547(a)(4).

Subsequently, a joint explanatory statement was given on the Senate and House floors by Senator DeConcini and Representative Edwards respectively. This statement provides, in relevant part, that:

> Section 547(b)(2) of the House amendment [i.e., the floor managers' compromise legislation] adopts a provision contained in the House bill and rejects

> an alternative contained in the Senate amendment [S. 2266] relating to the avoidance of a preferential transfer that is a payment of a tax claim owing to a governmental unit. As provided, §106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to the avoidance of preferential transfers.

124 Cong. Rec. 32400 (September 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. 34000 (Oct. 5, 1978) (statement of Sen. DeConcini).

As set forth above, the House Report had stated, "However, the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. §106.", thus indicating that sovereign immunity might prevent trustees from recovering preferences in the possession of the government. The joint statement clearly indicates that this language was overruled and that Congress intended that a trustee could assert his avoiding powers against the United States and recover preferential payments from the United States. Nothing found in the Bankruptcy Code, or the legislative history, contains any indicia of an intent to disavow the then existing case law that recognized the *in rem* jurisdiction of the bankruptcy court to take precedence with respect to any claim or assertion of sovereign immunity.

Petitioner relies on a selective reading of snippets of the legislative history to support its position that §106(c)(2) does not authorize a bankruptcy court to order the United States to pay money to a bankruptcy trustee. Quoting a portion of the legislative statements issued in conjunction with the original Senate and House proposals, the present §106(a) and §106(b), which stated "Congress does not, however, have the

power to waive sovereign immunity completely with respect to claims of a bankruptcy estate against the State," Petitioner posits that Congress enacted a narrow waiver of sovereign immunity, equally applicable to the United States and the States, because Congress was concerned about its power to abrogate completely the Eleventh Amendment immunity of the States. Petitioner omits the balance of that sentence which provides that Congress "may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." S. Rep. No. 989, *supra*, at 29: H.R. Rep. No. 595, 9th Cong., lst Sess. 373 (1977). Thereby ignoring the fact that §106(c), by waiving sovereign immunity only to specified Bankruptcy Code provisions represents an exercise of Congress' unique power to establish a uniform system of bankruptcy throughout the United States.

Similarly, Petitioner focuses on that portion of the legislative history of §106(c) which reflects Congressional intent to codify *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975), and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), "permitting the bankruptcy court to determine the amount and dischargeabilty of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim." 124 Cong. Rec. 32394 (1978) (comments of Rep. Edwards of California); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Yet the legislative history expressly states that:

> Subsection (c) *is not limited to these issues*, but permits a bankruptcy court to bind governmental units on other matters as well. For example, *§106(c) permits a trustee or a debtor-in-possession to assert avoiding powers under Title 11 against a governmen-*

tal unit; contrary language in the house report to H.R. 8200 is thereby overruled. [Emphasis added].

124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (statement of Sen. DeConcini). Indeed, if Congress had merely intended to codify the results in *In re Gwilliam* and *In re Dollard*, it need only have modified §505, the provision dealing with determination of tax liability, to address the problem.

Finally, Petitioner grudgingly admits that the legislative history specifies that under §106(c) a trustee will be able to assert his avoiding powers against a governmental unit. However, Petitioner argues that this means that a bankruptcy court can only determine that the transfer is voidable and cannot order its recovery. Petitioner's argument totally ignores the express language of §550, which provides a mechanism whereby the trustee can recover "avoided" transfers, or the value of the property transferred, from an "entity" (i.e., the United States). Further, as indicated above, the legislative history of §547 reflects that Congress understood that the consequences of enacting §106(c) would be to permit a trustee in bankruptcy to not only assert his or her avoiding powers against the United States but to recover the avoided transfer from the United States.

Petitioner's argument overlooks this Court's admonition that a waiver of sovereign immunity is accomplished not by a ritualistic formula but by reference to underlying Congressional policy. *Keifer and Keifer*, 306 U.S. at 389. As stated by this Court in *Block v. Neal*, 460 U.S. 289, 298 (1983) "The exemption of the sovereign from a suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Indeed, here as in *United States v. Yellow*

Cab, 543 U.S. at 554-55 (quoting *Anderson v. Hayes Construction Co.*, 243 N.Y. 140. 147. 153 N.E. 28, 29-30 (1926)), the observation of Judge Cardozo is apt. "No sensible reason can be imagined why the [United States], having consented to be sued, should thus paralyze the remedy." Thus, since the Sixth Circuit's analysis of §106(c) is supported by the language of the statute and the legislative history, the decision below was correct and should be affirmed.

E. The Interpretation Of §106(c) Adopted By The Court Of Appeals Is Consistent With And Advances The System Of Equitable Distribution Of Estate Assets To The Debtor's Creditors Which Is A Central Policy Of The Bankruptcy Code.

Congressional intent to waive federal sovereign immunity and the scope of such waiver can only be ascertained by reference to the underlying Congressional policy. *Keifer & Keifer v. Reconstruction Finance Corp*, 306 U.S. at 389. This Court has previously addressed the issue of whether the bankruptcy court has the power to order an agency of the United States to return property of the estate to the custody of the bankruptcy court. In *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), this Court identified two Congressional policies which were critical to its holding that §542(a) of the Bankruptcy Code authorized the bankruptcy court to subject the United States to a turnover order with respect to property seized pursuant to a valid tax levy prior to the commencement of the bankruptcy case.

First, this Court determined that Congress intended that a broad range of property be included in the bankruptcy estate, finding that:

§541(a) provides that the "estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." . . . Most important, in the context of this case, §541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under §363 to turn that property over to the trustee. . . .

As does all bankruptcy law, §542(a) modifies the procedural rights available to creditors to protect and satisfy their liens. In effect, §542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings. (Citations omitted).

Whiting Pools, 462 U.S. at 205-06.

This Court specifically noted that its analysis of §542(a) was consistent with other provisions of the Bankruptcy Code which address the scope of the estate: specifically, §544, giving the Trustee the right of a lien creditor; §545, granting the Trustee the power to avoid statutory liens; and §549, granting the Trustee the power to avoid certain post-petition transactions. *Whiting Pools*, 462 U.S. at 207, n. 15. And with other provisions which permit the trustee to demand the turnover of property in the possession of others: §543, dealing with property in the hands of a custodian; §545, granting the Trustee the authority to avoid statutory liens; §547,

granting the Trustee authority to avoid preferential transfers; §548, granting the trustee authority to avoid fraudulent conveyances. *Whiting Pools*, 462 U.S. at 205, n. 10.

Second, this Court determined that the United States was to be treated the same as any other creditor affected by the debtor's bankruptcy case:

> We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by §542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term "entity" used in §542(a), includes a governmental unit. §101(14). . . . Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien.

462 U.S. at 209.

This case implicates another key Congressional policy behind the enactment of the Bankruptcy Code: equality of distribution of the bankruptcy estate among creditors of the debtor. *Begier v. Internal Revenue Service*, 110 S. Ct. 2258, 2262-63 (1990). As this Court stated in *Acme Harvester*, 222 U.S. at 307, "It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors."

Congress enacted only one provision to ensure there be an equitable distribution of the collected and liquidated estate assets to creditors, §726 of the Bank-

ruptcy Code. Section 726 provides that distribution of these assets will be under the direction and control of the bankruptcy court. 11 U.S.C. §726. Sections §549(a) and §550(a), read together, advance the policy of equality of distribution to creditors that lies at the heart of bankruptcy law by providing a mechanism whereby property of the estate wrongfully transferred after the commencement of the case can be brought back into the bankruptcy estate. Indeed, §541(a)(3) specifically provides that property of the estate shall include any interest in property that the trustee recovers under §550 of the Bankruptcy Code. 11 U.S.C. §541(a)(3). Section 550(a) empowers the trustee in bankruptcy with the ability to recover avoidable transfers for the benefit of the estate. 11 U.S.C. §550(a). Finally, §551 provides for the automatic preservation of avoided transfers for the benefit of the estate. 11 U.S.C. §551. All of these provisions ensure that property of the estate comes within the jurisdiction of the bankruptcy court with a view towards the estate's equal distribution among creditors.

Petitioner alleges that there should be a different result when the United States is the creditor. The essence of Petitioner's argument is that the management of a debtor in possession should be allowed to steal money from the bankruptcy estate and transfer the money to the government in satisfaction of personal tax obligations, and that the bankruptcy court cannot look to the government as the beneficiary of the funds for recovery. Nothing in the Bankruptcy Code or in its legislative history indicates that Congress intended to except the United States from the ambit of §549. Congress specifically provided protection of the interests of the United States by granting it priority status for tax payments and by making certain tax obligations nondischargeable. Otherwise, the express language of the Code mandates that the United States be treated like

any other creditor. To hold differently would be in violation of those provisions that grant the bankruptcy court control over the cases that it administers and would frustrate a fundamental policy of bankruptcy law: equality of distribution to creditors. Consequently, the interpretation of §106(c) by the Court of Appeals is consistent with underlying Congressional Policy.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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